

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

OREGON INVESTORS, a California)
General Partnership,)

Plaintiff,)

v.)

JON M. HARDER, an individual,)
DARRYL E. FISHER, an indi-)
vidual, and KING'S MANOR)
OREGON, LLC, an Oregon Limited)
Liability Company,)

Defendants.)

No. CV-08-1252-HU

OPINION & ORDER

R. Scott Whipple
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BROWN, District Judge:

Plaintiff Oregon Investors, a California General Partnership,
brings this breach of contract and fraud action against defendants

1 - OPINION & ORDER

1 Jon Harder, Darryl Fisher, and King's Manor Oregon, LLC. Plaintiff
2 moves for summary judgment on the breach of contract claim, and
3 moves for default judgment on both the contract and fraud claims as
4 to King's Manor Oregon. The case has been stayed with regard to
5 Harder due to his bankruptcy filing on December 31, 2008. With
6 that one exception, I grant the motions.

7 BACKGROUND

8 Pursuant to Local Rule 56.1(f), the facts asserted by
9 plaintiff in its summary judgment motion, and supported by the
10 Declaration of Edward Pierce, are deemed admitted by Fisher and
11 King's Manor Oregon because those defendants failed to respond to
12 those asserted facts. Additionally, an Order of Default against
13 King's Manor Oregon was entered on January 8, 2009. Thus, the
14 well-pleaded factual allegations in the Complaint regarding that
15 defendant's liability are also deemed true. Fair Housing of Marin
16 v. Combs, 285 F.3d 899, 906 (9th Cir. 2002). The facts recited
17 here are therefore deemed admitted either by the Order of Default
18 or by defendants' failure to respond to the summary judgment
19 motion, or both in the case of King's Manor Oregon.

20 Oregon Investors is a group of individuals who formed their
21 partnership for the specific purpose of lending \$500,000 to Harder,
22 Fisher, and King's Manor Oregon. Waldman Management Group, Inc. is
23 the general partner of Oregon Investors. Pierce is a Vice
24 President and Chief Operating Officer of Waldman.

25 Harder is the Manager of King's Manor Oregon. Harder's
26 company Sunwest Management, has created multiple single purpose
27 limited liability companies that buy or build one assisted living
28 facility, which Sunwest then manages.

1 In discussing a loan by Oregon Investors to defendants, Pierce
2 made it clear that Oregon Investors would not lend any money
3 without sufficient collateral. Oregon Investors requested that
4 defendants pledge to Oregon Investors the future payments to be
5 received by King's Manor Oregon from defendants' fifty-percent
6 membership interest in King's Manor Washington, LLC, a Washington
7 limited liability company.

8 On October 31, 2002, the parties executed the "Installment
9 Promissory Note" ("the Note"), under which Oregon Investors agreed
10 to lend Harder, Fisher, and King's Manor Oregon, \$500,000, and
11 under which defendants agreed to pledge their interests in future
12 payments from their interests in King's Manor Washington as
13 requested. The terms of the Note, attached as Exhibit B to
14 Pierce's Declaration, require defendants to pay \$500,000 to Oregon
15 Investors with twelve-percent interest accruing from October 31,
16 2002, until paid. Exh. B to Pierce Declr.

17 The interest was payable on the first of each month beginning
18 December 1, 2002, until November 1, 2004. Id. The balance of the
19 principal and accrued interest were due on December 1, 2004. Id.
20 As security, defendants pledged "the future payment to be received
21 by [King's Manor Oregon] for its 50% interest in King's Manor, LLC,
22 a Washington limited liability company, and hereby certify that no
23 pledge has heretofore been made of such collateral." Id.
24 Defendants also agreed to make no distributions of cash or property
25 to any of its members so long as any principal or interest remained
26 unpaid on the note. Id.

27 If any installment was not paid, all principal and interest
28 was to become immediately due and collectible at the option of the

1 holder of the note. Id. Defendants waived "presentment, protest,
2 demand, notice of dishonor or default and notice of any kind with
3 respect to this note." Id. Defendants agreed to pay reasonable
4 attorney's fees and collection costs if the note were placed in the
5 hands of an attorney for collection. Id.

6 Based on the terms of the Note, Oregon Investors lent \$500,000
7 to defendants in October 2002. By oral agreement, the parties
8 agreed to an extension of the Note, and in a March 2008 written
9 agreement, the due date on the Note was extended to December 1,
10 2008 ("the Extension Agreement"). Exh. A to Pierce Declr.
11 Defendants made the required monthly payments through June 2008.
12 As of November 20, 2008, when plaintiff filed its summary judgment
13 motion, defendants had failed to make any of the required monthly
14 payments since July 2008.

15 Although defendants waived notice, on August 6, 2008, Pierce
16 personally delivered a letter to Harder informing Harder that
17 Harder, Fisher, and King's Manor Oregon were in default on the loan
18 and that Oregon Investors was declaring the Note fully due and
19 payable. Exh. C to Pierce's Declr. Harder acknowledged that he
20 was in default on the loan. Id.

21 Later in August, Pierce personally provided a copy of the
22 written notice to Wallace Gutzler, King's Manor Oregon's registered
23 agent, and to Thomas Wettlaufer, both of whom are legal counsel for
24 Sunwest. Both acknowledged receipt of the letter, and acknowledged
25 that the defendants were in default on the note.

26 Although the summary judgment motion was filed before the
27 December 1, 2008 payoff date of the Note, counsel informed the
28 Court during a January 7, 2009 telephone hearing, that the full

1 payment, due December 1, 2008, had not been made.

2 Finally, Harder filed for bankruptcy on December 31, 2008, and
3 a notice of automatic stay was filed in this Court on January 12,
4 2009.

5 SUMMARY JUDGMENT STANDARDS

6 Summary judgment is appropriate if there is no genuine issue
7 of material fact and the moving party is entitled to judgment as a
8 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the
9 initial responsibility of informing the court of the basis of its
10 motion, and identifying those portions of "'pleadings, depositions,
11 answers to interrogatories, and admissions on file, together with
12 the affidavits, if any,' which it believes demonstrate the absence
13 of a genuine issue of material fact." Celotex Corp. v. Catrett,
14 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

15 "If the moving party meets its initial burden of showing 'the
16 absence of a material and triable issue of fact,' 'the burden then
17 moves to the opposing party, who must present significant probative
18 evidence tending to support its claim or defense.'" Intel Corp. v.
19 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)
20 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th
21 Cir. 1987)). The nonmoving party must go beyond the pleadings and
22 designate facts showing an issue for trial. Celotex, 477 U.S. at
23 322-23.

24 The substantive law governing a claim determines whether a
25 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors
26 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as
27 to the existence of a genuine issue of fact must be resolved
28 against the moving party. Matsushita Elec. Indus. Co. v. Zenith

1 Radio, 475 U.S. 574, 587 (1986). The court should view inferences
2 drawn from the facts in the light most favorable to the nonmoving
3 party. T.W. Elec. Serv., 809 F.2d at 630-31.

4 If the factual context makes the nonmoving party's claim as to
5 the existence of a material issue of fact implausible, that party
6 must come forward with more persuasive evidence to support his
7 claim than would otherwise be necessary. Id.; In re Agricultural
8 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);
9 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,
10 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

11 DISCUSSION

12 The record establishes that Fisher and King's Manor Oregon,
13 LLC breached their contract with Oregon Investors when they failed
14 to make any interest payments after June 2008. At that point,
15 under the terms of the Note, all principal and interest was
16 immediately due and collectible at plaintiff's option. Pierce's
17 letter, personally delivered to Harder, with copies later
18 distributed to King's Manor Oregon's registered agent, clearly
19 communicated that Oregon Investors chose to call the full, unpaid
20 balance of the Note immediately due and payable. Moreover, payment
21 of the principal balance of the Note has not been paid. Fisher and
22 King's Manor Oregon are in default on the Note. As such, Oregon
23 Investors is entitled to summary judgment on the breach of contract
24 claim as to Fisher and King's Manor Oregon on the balance of the
25 Note and the missed interest payments. The motion as to Harder is
26 stayed as a result of the bankruptcy.

27 As for the default judgment motion, the same reasoning
28 supporting summary judgment on the breach of contract claim

1 supports a default judgment on that claim as to King's Manor
2 Oregon. As recited in the Complaint, and deemed true as a result
3 of the Order of Default, King's Manor Oregon knew, at the time the
4 Extension Agreement was signed, that defendants, and entities for
5 which they were responsible, had tens of millions of dollars of
6 outstanding debts. King's Manor Oregon was also aware at that time
7 that it would be unable to make payments as required by the Note.
8 King's Manor Oregon knew then that the proceeds of the Note would
9 be used for projects unrelated to King's Manor Oregon, King's Manor
10 Washington, or the residential care facility in Tacoma, Washington
11 which is King Manor Washington's sole asset.

12 King's Manor Oregon concealed the status of its financial
13 position from Oregon Investors. King's Manor Oregon knew it was
14 providing a false impression to Oregon Investors and intended that
15 Oregon Investors act in accordance with that false impression.
16 Oregon Investors reasonably relied on King's Manor Oregon, was
17 unaware of King's Manor Oregon's financial difficulties, and thus,
18 did not take steps to secure payment on the loan and instead,
19 relied on the value of the security pledge and prohibition against
20 distributions to execute the Extension Agreement. As a result,
21 Oregon Investors suffered damages.

22 Based on these facts, plaintiff demonstrates that it is
23 entitled to judgment on the fraud claim as well as the breach of
24 contract claim as to King's Manor Oregon. In the Complaint,
25 plaintiff seeks identical damages for both claims as follows: (1)
26 an order in plaintiff's favor that payments due to King's Manor
27 Oregon, LLC for its 50% interest in King's Manor Washington, be
28 vested in Oregon Investors as required by the terms of the Note;

1 (2) an order prohibiting any distributions be made to defendants
2 from King's Manor Oregon; (3) a judgment against defendants,
3 jointly and severally, awarding Oregon Investors the \$500,000
4 principal balance on the Note, plus unpaid interest through the
5 date defendants make payment in full of the Note; and (4) a
6 judgment in favor of Oregon Investors for its reasonable attorney's
7 fees.

8 Plaintiff seeks these same damages in its motion for default
9 judgment against King's Manor Oregon, LLC. Other than as to
10 Harder, against whom this action is stayed, the requested damages
11 are supported by the record. As there are no unliquidated damages
12 requested, no further evidence is necessary before entry of
13 judgment.

14 CONCLUSION

15 Plaintiff's motion for partial summary judgment (#11) on the
16 breach of contract claim is granted as to Fisher and King's Manor
17 Oregon, LLC. The motion is stayed as to Harder. Plaintiff's
18 motion for default judgment (#16) is granted. A separate Judgment
19 will be entered.

20 IT IS SO ORDERED.

21
22 Dated this 14th day of January, 2009.

23
24
25 /s/ Anna J. Brown
26 Anna J. Brown
27 United States District Judge
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